

United States
Court of Appeals
For the Ninth Circuit

OREGON AUTOMOBILE INSURANCE COMPANY,
Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Corporation, BEULAH MORRIS
and WILLIAM MORRIS,
Appellees.

Appellant's Reply Brief

Appeal from the United States District Court for
the District of Oregon

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REPLY TO BRIEF OF APPELLEES MORRIS

Appellees Beulah and William Morris have filed a brief in this court seeking to sustain the trial court's award to them of attorneys' fees against appellant Oregon Automobile Insurance Company. They also impliedly suggest (p. 7) that they desire attorneys' fees on this appeal.

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In our opening brief (p. 6) we pointed out that regardless of the outcome of this case, the rights of the Morrisises are fully protected. No one denies that their claims will be paid under one or the other of the two policies. The only question is which company should pay, and that question is purely between the two companies. The Morrisises need not be concerned over which company is ultimately held to be liable, and they need not take sides in this dispute.

In their answer (R. 43) as well as in the Pre-Trial Order (R. 54) the Morrisises asserted their claim against *both* companies. In the answer filed by Oregon (R. 30-31), in the Pre-Trial Order (R. 55-56), and also at the trial of this case (R. 91), the Oregon expressly admitted that after the U. S. F. & G. policy limits have been paid, then Oregon will be obligated to pay the balance. Oregon has never denied coverage except on the sole ground that the U. S. F. & G. policy is applicable; so if the U. S. F. & G. policy were held not to be applicable, then there would be no further dispute between Oregon and the Morrisises.

We therefore suggest that there was no real need for the Morrisises to participate, by counsel, either in the trial court or on this appeal. Presumably the only reason the Morrisises were joined as parties was so that whatever determination is made with respect to the policies will be an end of the matter.

Certainly the Morrisises have nothing to lose by this proceeding, no matter which way it is decided.

There is some doubt whether a counterclaim against both companies in a declaratory judgment action, where the only dispute is between the companies, is an "action brought upon a policy of insurance" within the meaning of O.C.L.A., Sec. 101-134. However, the Oregon does not raise that question, and at the time of trial we expressly stated that if the Oregon policy were held to be primary, we would not oppose the allowance of some attorneys' fees to the Morrisises (R. 152, 166, 175). We did think the amount originally claimed (which was on a contingency basis, R. 159) was excessive, and we argued that question only (R. 166-7).

We do not now dispute the reasonableness of the fee allowed by the trial court, and our only objection to the judgment for attorneys' fees is that it was awarded against Oregon rather than against U. S. F. & G. We now reiterate that if it be ultimately held that the Oregon policy is primary, we do not object to the allowance of attorneys' fees which was made by the trial court. Under these circumstances we submit that any further award of attorneys' fees on this appeal would be unjustified. We do not, of course, waive our position that the award of attorneys' fees in the trial court should have been against U. S. F. & G., rather than against Oregon; and this brings us back to the real question of which policy is primary.

REPLY TO BRIEF OF APPELLEE U. S. F. & G.

In the brief filed by Appellee, U. S. F. & G., that company professes to reject all of the rules outlined in our opening brief by which the courts have resolved the question presented here, and it offers in lieu thereof only the following:

“* * * the only rule that can be followed in determining respective responsibility of the insurance carriers is one of construction of the policies, separately and in connection with each other” (Appellee’s Br., p. 26).

While the foregoing statement is no doubt unobjectionable as a general platitude, it unfortunately gives no help in particular cases. The problem in this type of case arises only because the two policies are mutually contradictory, and the language of both cannot be given effect. To enforce the “other insurance” clause in either policy is automatically to cancel the corresponding clause in the other policy. It is because the two cannot be harmonized that the courts have turned to such factors as (1) the priority in date of issuance, (2) the general or specific nature of the coverage, and (3) the question of whose named insured is the primary tortfeasor.

Such considerations are not outside the scope of the policies, but are merely the methods by which the courts have interpreted the policies under the

facts of particular cases. Appellee does not point to any language in its policy which entitles its "other insurance" clause to any greater weight than that of Appellant, and in the absence of determinative language the question can only be decided by reference to matters such as those we suggest.

The Language of the Policies

If any distinction can be drawn between the "other insurance" clauses in the two policies, we submit that the Oregon policy is actually more emphatic in its exclusion than that of U. S. F. & G. While the U. S. F. & G. policy says that it "shall be *excess* insurance over any other valid and collectible insurance available to the Insured", the Oregon policy says that "this company *will not be liable* if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance * * *".

In other words, the U. S. F. & G. policy does not absolutely exclude coverage if there is other insurance, but it merely seeks to be excess; while the Oregon policy absolutely excludes coverage so long as the other policy exists. In effect, as we pointed out in our opening brief, the two clauses may have the same result, because when the U. S. F. & G. limits are exhausted it ceases to be valid and collectible, and the Oregon policy then comes into play. So the practical operation of the Oregon exclusion in

this case may be the same as if it had said *excess only*. For purposes of interpretation, however, if Appellee wishes to stand solely on the language of the two policies, the Oregon exclusion is stronger than that of U. S. F. & G., so it should be enforced in preference to that of U. S. F. & G.

In discussing the U. S. F. & G. policy, Appellee says “* * * a Plymouth *automobile* owned by Suter was insured by the United States Fidelity and Guaranty Company * * *” and “the fact of *its* insurance, however, has given rise to this controversy” (Appellee’s Brief, p. 3).

If by such statements Appellee seeks to give the impression that it insured only the Plymouth automobile, and not Suter, then such statements are misleading. On the contrary, the U. S. F. & G. policy insures “Ray E. Suter and/or Lela Suter”, and the insuring agreement is “To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay * * * etc.” In its “Use of Other Automobiles” clause the U. S. F. & G. agreed that “such insurance as is afforded by this policy with respect to said automobile [i.e., the Plymouth] applies with respect to any other automobile * * * etc.” (Ex. 1, R. 15-16).

Thus the U. S. F. & G. policy insured Suter, whether driving his own or any other automobile, and so far as this case is concerned it cannot be said that its coverage with respect to the Plymouth

was of any stronger effect than its coverage for any other vehicle which Suter might be driving. Of course, the "other insurance" clause modifies the "use of other automobiles" clause, but Appellee cannot lift itself by its own bootstraps by assuming that its coverage is basically for the Plymouth and only incidentally for Suter. The exact opposite is true—that its coverage is basically for Suter, regardless of what vehicle he is using.

By the same token the Oregon policy is basically for the purpose of insuring the Redmond Motor Company, and such coverage as it extends to other persons is only because those persons happen to be driving cars owned by the Redmond Motor Company. With the Oregon policy the coverage follows the vehicle, to include any permissive driver; whereas with the U. S. F. & G. policy the coverage follows Suter, to include any car he happens to be driving. Therefore, as we stated in our opening brief, under the facts of this case the U. S. F. & G. policy is *driver* insurance, while the Oregon policy is *vehicle* insurance.

The validity of our contention that *driver* insurance is primary and *vehicle* insurance is secondary (Appellant's Brief, pp. 31-2, 37) is apparently recognized by Appellee, for it seeks to twist its policy so as to give itself the benefit of that rule. Thus on page 15 of its brief, Appellee states with reference to the cited cases that:

“* * * in each case the insurance company having coverage of the person responsible for the operation of the vehicle involved in the accident was held to have primary coverage.”

That is exactly our position in this case. Here, Suter was responsible for the operation of the vehicle involved, and the Redmond Motor Company was not. The U. S. F. & G. had insured Suter, whereas the Oregon had insured Redmond Motor Company. We submit that for this reason alone, apart from the other factors involved, the U. S. F. & G. policy was primary.

Appellee suggests in its brief (p. 16) that there is doubt whether the U. S. F. & G. policy applies at all, because of an exclusion with respect to “any accident arising out of the operation of an automobile repair shop, public garage, sales agency, * * * etc.” There is not the slightest evidence in this case that the accident in question arose out of the operation of a garage or similar agency. The stipulated facts are merely:

“That on or about October 15, 1949, the defendant Raymond Suter was driving and operating a certain Mercury automobile, bearing dealer’s license A75, belonging to the defendant Redmond Motor Company, with the knowledge and consent of the Redmond Motor Company. At said time a collision occurred between the vehicle Raymond Suter was operating and an automobile in which the defendant Beulah

Morris was a passenger, as a result of which said Beulah Morris received certain personal injuries" (R. 50).

There is no evidence in the record whatsoever to support Appellee's assertion (Appellee's Brief, p. 2) that Suter had obtained the car for demonstration purposes, or that he was considering purchasing it. Furthermore, even if there were such evidence, that would not make the accident one *arising out of the operation* of a garage or similar agency.

Computation of Insurance Premiums

In its brief (p. 26) Appellee makes the following assertion, in support of its contention that *vehicle* coverage should be primary and *driver* coverage secondary:

"* * * It is a known fact that many different types of vehicles are insured, namely, public or private, business or pleasure, large or small, old or new, and in good or bad condition. The result is that insurance carriers customarily consider the above categories in fixing the premium * * *."

At the time of the hearing in the trial court, the Oregon offered evidence relating to the manner of computing liability insurance premiums, which evidence tended to prove the contrary of Appellee's contention above quoted (R. 169-174). The evidence

was offered pursuant to a proposed amendment to the Pre-Trial Order, which was as follows:

“The defendants Houk Motor Company, Redmond Motor Company, and Oregon Automobile Insurance Company contend that in the business of automobile liability insurance generally and as carried on by the defendant Oregon Automobile Insurance Company in particular, when separate policies exist covering the driver and the car, the insurance on the driver is considered primary and that on the car is considered secondary, and in computing rates for liability insurance such rates are based on the risks arising from the particular driver and have no relation to the particular kind of car being driven” (R. 112-113).

At that time Appellee objected to the amendment, and the court denied the amendment (R. 113), although leave to amend the Pre-Trial Order in certain respects had previously been expressly reserved (R. 107). The trial court then rejected the offer of proof which was made to support the proposed amendment (R. 174).

Appellee has itself now made an issue with respect to the manner of fixing insurance premiums, and we therefore submit that the court may consider our offer of proof on that subject. Since our evidence was the only proof on that issue, it stands undisputed. Under Rule 15, F.R.C.P., “when issues

not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

The evidence to which we refer (after qualifying the witness) showed that classifications for liability rates are established by statistical bureaus from the accumulation of experience figures from various insurance companies; that the National Bureau of Casualty Underwriters issues a manual of rate classifications for all types of liability insurance; that Appellant, Oregon Automobile Insurance Company, follows generally the classifications so established*; that the factors entering into computation of an automobile liability rate are "the territory or location, the individual, his age, occupation, perhaps, or the use made of the automobile"; and that the particular kind of automobile he is driving has no bearing (R. 171). The evidence further showed that prior to March, 1940, the kind of automobile was a factor, but that about that time there was a complete change, and since then the kind of automobile has been of no importance (R. 171-173).

With respect to a garage liability policy, such as the Oregon policy in this case, it was testified that the premium was computed on the basis of the insured's payroll, without consideration of the

*The use of insurance rating bureaus is specifically authorized by statute in Oregon. Chapters 337 and 338, Or. Laws, 1947.

kind or number of vehicles involved (R. 173-4). The basic garage liability features of the policy only cover the garage itself and its employees, and when an additional-interests clause is added, such as in this case, the premium for the coverage for permissive drivers is merely a percentage of the basic payroll premium (R. 173-4).

Thus the evidence shows that during the times involved in this case insurance carriers *did not* customarily consider the types of vehicles in fixing premiums, as Appellee asserts, but on the contrary, the factors affecting premiums related entirely to the risks pertaining to the particular driver.

In fact, Appellee's own policy shows that for rating purposes certain classifications are established which depend upon (1) the type of driving involved, (2) the age of the driver, and (3) the probable yearly mileage (R. 19-20). Nothing is said in Appellee's own classification about the type of vehicle to be driven. Thus Appellee's assertion about premium computation is refuted not only by the evidence in the record, but by its own policy.

Since it is recognized in the trade (as common experience would also indicate) that liability hazards are dependent upon factors personal to the driver, and not related to the particular automobile, we submit that the *driver's* coverage should be primary and the *vehicle* coverage should be secondary.

Appellee's Cases

As we pointed out in our opening brief, the courts have had some difficulty with this problem, and the cases are not all in agreement. However, Appellee has cited only four cases in addition to those discussed in our opening brief, and of these not one can fairly be said to be contrary to our position here.

In *Great American Indemnity Co. v. McMenamin*, 134 S.W. (2d) 734 (Tex. Civ. App., 1939), one Lowe was an employee of Paramount, and he caused an accident while on business of his employer, rendering Paramount liable to the injured person. Judgment in the tort action was returned only against Paramount, because Lowe was outside the jurisdiction. Lowe had been driving his own personal car, and he carried his own insurance with the Great American. His policy with Great American had an omnibus clause protecting those legally responsible for the use of his automobile, but excluding coverage if such additional insured had other valid and collectible insurance. Paramount itself had a non-ownership policy with the Employer's Liability Company, protecting it against liability arising out of the use of any automobile in its business. Its policy contained a clause making it excess only, if there was other insurance on behalf of any one other than its named insured under which Paramount would be entitled to protection.

The court held that the Great American policy was primary and the Employer's policy was excess.

This is not contrary to our position, but in fact supports it. Paramount was not the primary tortfeasor, but was only vicariously liable because of the master and servant relationship. Since the primary tort-feasor—Lowe—was the named insured in the Great American policy, the holding that such policy was primary was in line with the cases cited under Point III of our opening brief (pp. 28-32). Furthermore, Lowe was driving his own car at the time of the accident, and Great American would have been liable to pay the tort judgment on behalf of Lowe himself, except for the fact that Lowe was outside the jurisdiction.

The case of *Travelers Indemnity Co. v. State Automobile Ins. Co.*, 67 Ohio App. 457, 37 N.E. (2d) 198 (1941) (erroneously cited by Appellee as 34 N.E. 198), can be harmonized with the cases cited in our opening brief because there the owner's policy, which was held to be primary, was issued on May 18, 1938, and the driver's policy, which was held to be excess, was not issued until September 14, 1938. As we have previously pointed out (Point I, Appellant's Brief, pp. 23-25) a number of cases hold the policy of prior date to be primary, and in the present case the U. S. F. & G. policy is earlier in date. The opinion in that case is unsatisfactory, however, for it does not really analyze the question and does not

state the reasoning by which the court arrived at its decision.

The case of *State Farm Mutual v. Hall*, 292 Ky. 22, 165 S.W. (2d) 838 (1942) (erroneously cited by Appellee as 165 S.W. 838), can likewise be explained on the ground that the owner's policy was issued on October 26, 1938, and the rider on the driver's policy, which covered his use of other automobiles, was not issued until May 29, 1939. However, that case does not decide the question presented here, for the owner's policy had not been pleaded, and it does not appear what, if any, provision it contained dealing with other insurance. In sending the case back for further proceedings, the court pointed out that it could not pass on the merits as between the two companies until the owner's policy was pleaded.

Likewise, the case of *Speier v. Ayling*, 158 Pa. Super. 404, 45 A. (2d) 385 (1946), does not decide the present question, because in that case only one of the policies had any excess clause at all. Ayling was driving Speier's automobile, and Speier was riding in the car. An accident occurred by reason of Ayling's negligence, and Speier recovered judgment against Ayling. Ayling (the driver) carried insurance with Allstate, which covered him while driving any automobile, and Speier (the owner) had a policy with Threshermen, which covered permissive drivers. Both policies provided that they

would pro-rate with other insurance, but the Allstate policy provided that as to Ayling's use of other cars, its coverage was excess only. The Threshermen policy *did not have an excess insurance clause* (45 A. (2d) 388, n. 6). The court held that the Allstate policy was liable, but the decision has no bearing on a situation where, as here, *both* policies have excess clauses.

The other cases cited or relied on by Appellee have already been discussed in our opening brief, and it would be an imposition for us to repeat our analysis of those cases. We would point out, however, that the quotation from Appleman (Appellee's Brief, p. 19) is a good illustration of the circular reasoning condemned by the Court of Appeals for the Second Circuit in the *Kearns* case (118 F. (2d) 33, cert. den. 313 U.S. 579). What Appleman says, in effect, is that the other insurance clause in the primary policy is not given effect because the insurance under the excess policy is not collectible, so long as the primary policy exists. This merely begs the question, for it assumes that one or the other is primary to start with. No reason is offered—and Appellee suggests none in this case—why the other insurance clause in the owner's policy is not entitled to as much weight as the other insurance clause in the driver's policy.

In order to avoid such fallacious reasoning it is necessary to look to the underlying purpose of the

two types of insurance—i.e., driver coverage and vehicle coverage. The U. S. F. & G. policy was intended to protect its named assured, Suter, no matter what car he was driving, and its premium was computed on the basis of *his* driving risks—his age, occupation, residence, and the amount and kind of driving he would likely be doing. On the other hand, the Oregon policy was intended to protect the Redmond Motor Co., and the coverage it extended to permissive drivers such as Suter was purely incidental to its main purpose. The premium for the Oregon policy was computed on the basis of the assured's payroll. Whereas the assured's payroll, as an indication of the size and scope of its business, would have an actuarial bearing on the risks arising from the assured's own operations, it would obviously not reflect any risk arising from Suter's driving ability or accident history. Suter was totally unknown to the Oregon, but he was the very person with whom U. S. F. & G. had directly contracted.

Thus the practical considerations of the insurance business, as well as the rationale of the decided cases, point to the U. S. F. & G. policy as the primary coverage. This does not "nullify the rule of respondeat superior" (Appellant's Brief, p. 18) nor does it "throw out of the window all coverage of corporations" (Appellant's Brief, p. 26). The question only arises where both policies are otherwise ap-

plicable, and to hold that the tort feason's policy is primary does not invalidate the other, but merely postpones it until the tort feason's own policy has first been used.

CONCLUSION

We therefore submit that the trial court erred in holding the Oregon policy to be primary and the U. S. F. & G. policy to be excess, and that this court should reverse that determination and hold the U. S. F. & G. policy to be primary and the Oregon policy to be excess. As far as the Morrises are concerned, their rights will follow automatically from whatever determination is made between the two companies.

Respectfully submitted,

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